A GOVERNMENT OF LAWS, NOT OF MEN.

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THERE is a story of a king of Spain being burned to death in his own palace because there was no one present of sufficient rank to approach the unhappy monarch and pull off his burning clothes. And we have among us persons, standing on ceremony quite as punctilious, who, while admitting that it is high time that some one should speak out concerning the lawlessness of the police of New York city—or, rather, of the sort of persons who have usually been put in rule over them — profess to think that one holding the office of Judge should not do so, even though the fundamental guaranties of individual rights and liberties on which free government rests are being trampled under foot and degraded. Some canon of etiquette, actual or fancied, prevents a Judge (so they say) from saying a word on the subject while off the bench. It is with some diffidence, therefore, that I comply with a request to write a supplement to my article which appeared last month in the NORTH AMERICAN REVIEW on the "Lawlessness of the Police in New York." But when I search my memory and my library very little indeed, I find so many instances (even recent ones) of Judges speaking and writing on legal and governmental subjects while off the bench, without any one carping over their action, that I feel quite reassured that, though a Judge off the bench may not say everything, he may say very much more than that his soul is his own, without violating any rule of etiquette. Nor among Judges generally is there any notion that a Judge may not with propriety write or speak about questions of law and government while off the bench.

There seems also to be a considerable number of persons whose

vague understanding is, that the prohibitions under Anglo-Saxon law and tradition against arrests and house invasions without warrants, and which are expressed in our laws and fundamental instruments of government everywhere in this country, are meant only for the protection of "good" people, with whom they of course class themselves; and that therefore they need not trouble themselves about such things. They do not seem to understand that it is not for the prosecuting officers or the police to determine that a given individual is guilty. Some also seem to think that such prohibitions may be suspended when we have a "good" District Attorney or a "good" Commissioner of Police in office. They do not seem to realize that what "good" police officials and prosecuting officers assume to do will be done by their "bad" successors. Free government is divided into the legislative, executive, and judicial branches, each with a separate sphere of jurisdiction and action. The legislative branch makes the laws, except in so far as the citizens at large make them by their direct vote, as is the case with our state constitutions, which are laws made by the direct vote of the people; the executive branch, through its subdivisions and branches (of which the police force is one), carries out the laws; and the judicial branch determines who are guilty under the laws, and interprets the laws where disputes arise, and in that way holds in check or prevents all acts and conduct of the other two branches which are in excess of their powers. If the police could make and interpret laws, and also say who was good and who bad, who innocent and who guilty, there would be no limitation on their power, and they could do as they please. But that would not be free government; it would be despotism.

No one should forget for a day that our government, like all free governments, is one of laws and not of men. The people enact their laws, and then put some of their number in official positions to carry them out. They do not put persons in office to do as they please, but to keep within the laws. They do not tolerate that persons put in office to enforce the criminal laws shall themselves exceed or violate the laws defining their powers and duties, and the method and procedure they must follow. When a prosecuting attorney, or a police official, says, "I can't detect crime, I can't discover gamblers or wayward women, in their privacy, by keeping within the law," the emphatic answer of the law is, "Then don't." Experience has shown in all ages that it

is far more important to the common weal that officials should not be permitted to transgress the laws, than that even all of the malefactors, let alone petty offenders, should be arrested. When officials assume to override the law and do as they please, instead of following and carrying out the law, they pervert the government into one of men and not of laws. It was to the end that our government should be one of laws and not of men—especially of unscrupulous, sensational, or unbalanced men—that it was divided into the three branches, legislative, executive, and judicial, as is expressed in that eloquent clause of the Massachusetts Bill of Rights which Rufus Choate declared could not be read without a "thrill of sublimity," viz.:

"In the government of this Commonwealth, the Legislative Department shall never exercise the Executive and Judicial powers, or either of them: the Executive shall never exercise the Legislative and Judicial powers, or either of them: the Judicial shall never exercise the Legislative and Executive powers, or either of them: to the end that it may be a government of laws and not of men."

There are some extraordinary provisions in the charter of the city of New York in respect of the powers and duties of the police. A member of the last commission for the revision thereof, who was probably the ablest man on it, saw and noted their dangerous character, and the gross abuses which could be committed under them; and, no doubt, they will be the subject of further consideration. Section 315 gives the police the power and makes it their duty "at all times of the day and night," to:

"carefully observe and inspect all places of public amusement, all places of business having excise or other licenses to carry on any business; all houses of ill-fame or prostitution, and houses where common prostitutes resort or reside; all lottery offices, policy shops, and places where lottery tickets or lottery policies are sold or offered for sale; all gambling-houses, cock-pits, rat-pits, and public common dance houses, and to repress and restrain all unlawful and disorderly conduct or practices therein."

We have here lawful and unlawful businesses and places enumerated in one common class, with a provision that the police shall "carefully observe and inspect them," and "repress and restrain all unlawful and disorderly conduct or practices therein." Any one can understand how policemen may be detailed to duty in licensed public places, such as theatres and other places of

public amusement, to "carefully observe and inspect" them, and "repress and restrain all unlawful or disorderly conduct or practices" therein. But does this statute mean, for instance, that policemen may be detailed to do such duty in houses of ill-fame, *i.e.*, to sit or stand about in them, and "carefully observe and inspect them," and keep order in them? If so, was it intended to legalize such places, and put them under the visitation, inspection, and management of the police? It is not for the present writer to express an opinion on that head. The higher courts would probably find no difficulty in construing and limiting this statute; but how those in control of the police would construe it for their purposes is another thing. The community has not understood that such places have been legalized; but that fraction of the community who are observant see very clearly how this rather obscure and confused statute may be used by those in control of the police to assert a right of visitation over such places, and thereby levy an immense blackmail upon them. Under it such places might be and, it is said, have been in effect really licensed by the police authorities, and a vast illegal revenue derived from them and divided among officials and outside politicians. There are persons who believe it was cunningly devised for that very purpose. Do the zealous persons who uphold the police in visiting and intruding themselves into houses without warrants, and want that order of things continued, ever realize what dupes they are, and what a purpose they are serving? If there be anything known to persons familiar with history, and the origin and growth of evils and abuses in government, it is that if those who control the police are suffered to use the police to visit and enter houses at will without warrants, they will accept a weekly or monthly price to stay out, or not to interfere. The lesson derived from experience, and which Anglo-Saxon law and liberty epitomize and teach, is that the place for the police is out of doors, to preserve the public peace and keep outward order and decency, and that they may not enter houses without a warrant in their hands, except in the extreme cases provided for by law—such as when in pursuit of one who is escaping from arrest, or when some one cries out for help therein, and the like. If the simple law in this respect were put in force in the city of New York by a general order to the police force, followed up by a dismissal from the force of every one, high or low, who violated it, the immense system of

police blackmail which is claimed to exist, and which officials bewail that they are unable to cope with, would at once be destroyed. The problem of how to break the alleged alliance between the police and crime would be solved. Whether such an alliance exists is not to be asserted or discussed here.

If the purpose of the provision of the charter cited above is to allow the police to enter houses without warrants, then it is obviously contrary to the prohibition in the Bill of Rights (cited in my former article) against entering and searching houses without a warrant obtained on oath from a magistrate or court.

Section 318 of the charter provides as follows:

"If any two or more householders shall report in writing, under their signature, to the police commissioner or to a deputy police commissioner, that there are good grounds (and stating the same) for believing any house, room or premises within the said city to be kept or used as a common gambling house, common gaming room, or common gaming premises, for therein playing for wagers of money at any game of chance, or to be kept or used for lewd and obscene purposes or amusements, or the deposit or sale of lottery tickets or lottery policies, it shall be lawful for the police commissioner or either of his deputies, or a deputy chief of police to authorize, in writing, any member or members of the police force to enter the same, who may forthwith arrest all persons there found offending against law, but none others; and seize all implements of gaming, or lottery tickets, or lottery policies, and convey any person so arrested before a magistrate, and bring the articles so seized to the office of the property clerk."

This is also contrary to the prohibition in the Bill of Rights already mentioned, which allows a house to be entered only on a warrant, obtained on oath, of a court or magistrate. It purports to permit a house to be entered on the unsworn statement of two householders, and without obtaining a warrant. Its prototype seems to be a temporary law passed by the Legislative Assembly during the French Revolution. It is out of place in the Anglo-Saxon world, and wherever else free government now exists. It is not at all probable that responsible householders could be found who would run the risk of an action for damages for being instrumental in causing a house to be entered in such a loose and extraordinary way. This is probably the reason why the enactment is a dead letter. The possibility exists, however, that, by the police instigating irresponsible householders to act in accordance with its provisions, it may be made an instrument of abuse.

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